No. 96-491

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In The

Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC. and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the appellate court correctly decide that Petitioners cannot state a claim for interference with their non-vested health and welfare benefits in violation of Section 510 of ERISA, 29 U.S.C. § 1140, which prohibits only interference with the attainment of rights to which a participant "may become entitled" under a plan?

2. Did the appellate court correctly decide that the Railroad Retirement Act (RRA) of 1974 constitutes a "governmental plan" excluded from ERISA's coverage based on Congress' express exclusion of that statute's predecessor, the RRA of 1937, and its intent to exclude railroad retirement benefits generally from ERISA's scope?

3. Did this Court's recent decision in *UFCW v. Brown Group*, 116 S. Ct. 1529 (1996), rendered two months after the appellate court's decision in this case, so revise the law of "associational standing" that it conflicts with the appellate court's determination that the petitioner association lacks standing to sue for money damages on behalf of its members for alleged violations of ERISA and the Federal Employers' Liability Act? Does *Brown Group* now confer such standing on the association, even though Congress did not authorize such suits by an association under either ERISA or FELA and the claims asserted and relief requested necessarily would require the participation of each of the association's individual members in the lawsuit?

LIST OF INTERESTED PARTIES

The parties to this proceeding are correctly identified in the Petition for Writ of Certiorari. In addition, pursuant to Supreme Court Rule 29.6, the Respondent corporations hereby identify their respective parent companies and non-wholly owned subsidiaries:

Respondent Santa Fe Pacific Corporation was not served with the complaint in this action and accordingly was not a party to the proceedings below. Nevertheless, its parent corporation is Burlington Northern Santa Fe Corporation, and it has no non-wholly owned subsidiaries.

Respondent The Atchison, Topeka and Santa Fe Railway Company's parent corporation is Santa Fe Pacific Corporation. Its non-wholly subsidiaries consist of Alameda Belt Line, Belt Railway Company of Chicago, Central California Traction Company, Houston Belt and Terminal Railway Company, Kansas City Terminal Railway Company, Oakland Terminal Railway, St. Joseph Terminal Railroad Company, Sunset Railroad Company, Texas City Terminal Railway Company, Wichita Union Railway Company, and TTX Company.

Respondent Santa Fe Terminal Services Inc.'s parent corporation is The Atchison, Topeka and Santa Fe Railway Company. It has no non-wholly owned subsidiaries.

Respondent In-Terminal Services, Inc.'s parent corporation is Lanco International. It has no non-wholly owned subsidiaries.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The petition fails to present compelling reasons for review by this Court within the meaning of Supreme Court Rule 10. For the reasons argued more fully below, the per curiam panel of the Ninth Circuit Court of Appeals properly held that Petitioners may not maintain a claim for relief for a violation of Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA") for interference with their non-vested health and welfare benefits because these are not benefits to which Petitioners "may become entitled" within the meaning of Section 510. The Court also correctly held that the Railroad Retirement Act of 1974 is a "governmental plan" exempt from ERISA's coverage, and that Petitioners cannot state a claim for relief for interference with their rights to receive railroad retirement benefits under ERISA. Lastly, the court below correctly concluded that Petitioner Inter-Modal Rail Employees Association does not have standing to prosecute this action on behalf of its members because the participation of each affected employee will be required. The petition for writ of certiorari should accordingly be denied in its entirety.

STATEMENT OF THE CASE

This action arose out of a change in the employment of Petitioners' alleged members on March 31, 1990. Until that date, Respondent Santa Fe Terminal Services, Inc. ("SFTSI") was signatory to an agreement with Respondent The Atchison, Topeka and Santa Fe Railway Co. ("ATSF") to provide loading and unloading of "intermodal" trailers and containers on and off of rail flatcars at the Railway's "Hobart yard" rail terminal in Los Angeles. In early 1990, SFTSI was competitively outbid by another company, Respondent In-Terminal Services, Inc. ("ITS"), for a new service agreement. As a consequence, most of Petitioners' alleged members transferred their employment

from SFTSI to ITS effective April 1, 1990, and allegedly suffered a loss of employment benefits thereby.

Petitioners are the Inter-Modal Rail Employees Association ("IMREA") and five Teamster-represented employees who were hired by ITS as a result of the change in the independent contractors. In their first claim for relief, Petitioner IMREA alleges that the service agreement for intermodal freight hauling services between SFTSI and the Railway was canceled, and that its members' employment with SFTSI was terminated, for the purpose of avoiding the continued payment of railroad retirement taxes on their behalf. (*See* Complaint, ¶ 28).[1] Petitioners further allege that after they were hired by ITS, they suffered a reduction in contributions to, and benefits from, their Teamster-sponsored multi-employer pension and health and welfare plans, and that contributions on their behalf to the Railroad Retirement Board were eliminated. (Complaint, ¶ 30).

In their second claim for relief, Petitioners allege that they sustained personal injuries as a result of their exposure to loud noises and toxic chemicals at the Hobart rail terminal during their employment with SFTSI. (Complaint, ¶¶ 43-4). Petitioners further allege that as a result of the Respondents' negligence, they have suffered injuries to their skin, nervous systems, and psychological well-being, as well as "anxiety, post-traumatic stress disorder and depression," and "cancerphobia." (Complaint, ¶¶ 48-9).

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1. SFTSI paid railroad retirement taxes on behalf of its employees under the Railroad Retirement Act. ITS pays retirement taxes on behalf of its employees under the Federal Insurance Contribution (Social Security) Act, 26 U.S.C. § 3101, *et seq.* SFTSI and ITS are not related corporations or affiliated in any way.

REASONS FOR DENYING THE WRIT

I.

THE PER CURIAM OPINION PROPERLY HELD THAT PETITIONERS DID NOT STATE A CLAIM UNDER ERISA FOR INTERFERENCE WITH THEIR RIGHT TO RECEIVE HEALTH AND WELFARE BENEFITS.

Petitioners' first claim for relief is based on an alleged violation of § 510 of ERISA, 29 U.S.C. § 1140. That section provides that:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this title, Section 3001, or the Welfare and Pensions Plans Disclosure Act, or *for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan*, this title, or the Welfare and Pension Plans Disclosure Act.

(Emphasis provided).

Congress enacted Section 510 primarily to prevent employers from arbitrarily discharging employees whose pension rights are about to vest and from harassing employees in order to keep them from obtaining vested pension rights. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980). No Section 510 claim lies, however, where the alleged loss of such rights is

a mere consequence of, as opposed to a motivating factor behind, the termination. *Dytrt v. Mountain State Telephone and Telegraph Co.*, 921 F.2d 889, 896 (9th Cir. 1990).

The per curiam panel upheld the dismissal of Petitioners' Section 510 claim for interference with their non-vested welfare benefits based on the Ninth Circuit's prior decisions in *DeVoll v. Burdick Painting, Inc.*, 35 F.3d 408, 411 (9th Cir. 1994) and *Joanou v. Coca-Cola Co.*, 26 F.3d 96, 98 (9th Cir. 1994), which held that employers are legally free to unilaterally amend or eliminate medical, severance and similar kinds of non-vested welfare benefits which do not "vest" under the terms of ERISA. The panel reasoned that because employers "remain free to unilaterally amend or eliminate [health and welfare] plans without considering the employees' interests," no claim for "interference" with Petitioners' rights to receive further health and welfare benefits could be stated. *See* Per Curiam Opinion reported at 80 F.3d 348, 351 (Appendix I to Petition, pp. 8a-9a), *citing DeVoll, supra*, 35 F.3d at 411.

In reaching this conclusion, the Ninth Circuit also relied on its previous decision in *West v. Greyhound Corp.*, 813 F.2d 951, 955 (9th Cir. 1987), in which a Section 510 claim was rejected under remarkably similar circumstances. In *West*, a successor company failed to hire a number of unionized employees of its predecessor after the employees refused to work under a collective bargaining agreement which would have reduced their level of unaccrued welfare and unvested pension benefits. The Ninth Circuit specifically rejected the employees' claim that their termination, and the refusal of the successor corporation to hire them, violated Section 510. Recognizing the significance of the word "right" in Section 510, the *West* court stated:

> To qualify for relief under Section 1140 [510], the participant or beneficiary must show that he was exercising a "right to which he is entitled" or to which he "may become entitled." The [plaintiff employees] have failed to show any act of discrimination for asserting a right to which they were entitled or may become entitled under ERISA.... *The modifications suggested by [the successor] did not affect any accrued or vested rights owed to them by [the predecessor].*

Id. at 954 (emphasis provided).

Similarly, since SFTSI's employees had no right to any continued level of health and welfare benefits, or indeed to any health and welfare benefits at all, no actionable claim for a violation of Section 510 can be stated in this instance. ITS, which took over the intermodal contract through competitive bidding, was free through negotiations with the Teamsters Union to set any level of health and welfare benefits it desired, or to even eliminate them completely. *Bellingham Frozen Foods, Inc. v. NLRB*, 626 F.2d 674, 678 (9th Cir. 1980) ("a purchaser of assets is under no obligation to hire employees of a predecessor and is free to set the initial terms of employment for these employees should it decide to hire them"). The *West* court in fact recognized that Section 510 could not be used to thwart federal labor policy relating to business transfers:

> As an employee has no ERISA right to future, unaccrued benefits, he cannot claim discrimination because a purchaser of business assets will not hire him for insisting on unacceptable terms. If we were to hold

> otherwise, we would emasculate our holding in *Bellingham* that a new employer may set the terms of employment. *Bellingham*, 626 F.2d at 678.

West v. Greyhound Corp., supra, 813 F.2d at 955. Accordingly, if the new employer in *West* was free to refuse to hire the predecessor employer's employees at lower benefits, ITS was *a fortiori* legally privileged to hire Petitioners' members and to negotiate a new contract with their Union which allegedly altered their benefit package.

To this end, no court has ever held that a Section 510 claim can be established based on a mere reduction in employee benefits resulting from a lawful change in contractors such as that which occurred in this case. American businesses enter into and terminate service contracts every day for purely economic reasons, some having to do with labor costs, without running afoul of ERISA. To permit Petitioners to proceed with a Section 510 claim for "interference with" their non-vested welfare benefits would therefore be both unprecedented and contrary to settled law, and could potentially result in spurious ERISA claims brought by any employees who suffer a detrimental change in their health coverage as a result of a lawful change in subcontractors.

The Eleventh Circuit's opinion in *Seaman v. Arvida Realty Sales*, 985 F.2d 543, 546 (11th Cir. 1993), relied on by Petitioners, was properly rejected by the per curiam panel as an incorrect application of the law. The *Seaman* case ignored the critical language of Section 510, which requires that the participant have a "right" warranting protection under the statute in order to be able to state a Section 510 claim. The court below properly focused on the fact that in this instance the SFTSI employees had no "right," indefinite or otherwise, to

expect the same level of health and welfare benefits when and if they were rehired by ITS, and that no Section 510 claim could accordingly lie in this instance.

Seaman is also factually distinguishable. There, the employer terminated an employee for refusing to accept a change in status from employee to independent contractor, which would have resulted in her loss of health insurance benefits under circumstances in which all remaining employees would have continued to receive such benefits. If the plaintiff in *Seaman* had remained an employee, she would accordingly have continued to enjoy a "right" to receive such benefits. In contrast, Petitioners' members clearly had no "right" to any continued level of benefits following the termination of their employment with SFTSI.

Further distinguishing *Seaman* is the fact that any decrease in the level of Petitioners' welfare benefits in this case was merely the result of a change in contribution levels resulting from the give-and-take of labor negotiations between ITS and the Teamsters Union, as opposed to the kind of unilateral employer action eliminating an employee's eligibility for benefits that was involved in *Seaman*. In fact, the *Seaman* court expressly acknowledged that Section 510 does not prohibit employers from changing the terms of a plan and, like the Ninth Circuit, confirmed that employers may "modify non-vested benefits at any time." *Id.*, 985 F.2d at 547. That, of course, is all that Respondent ITS is alleged to have done after hiring Petitioners' members, by allegedly negotiating a lower employer contribution rate to Petitioners' Teamster-sponsored health and welfare plan than that which applied to their previous employer, SFTSI.

Petitioners' reliance on *Heath v. Varity Corp.*, 71 F.3d 256 (7th Cir. 1995) is also misplaced. In that case, the Seventh

Circuit merely decided that a Section 510 claim could be brought for interference with employees' early retirement benefits that were based on past service with the employer and to which some arguable future "right" existed. In fact, the district court in *Heath* appropriately characterized such benefits as "unaccrued benefits of vested employees." *Id.* at 256. Although the Seventh Circuit chose to characterize such benefits as "unvested" for the purpose of its decision, such benefits were clearly different in nature and kind from the health and welfare benefits at issue in this case, which SFTSI had the unqualified right to terminate as a matter of law. In fact, the Seventh Circuit has very recently concluded that early retirement benefits constitute "accrued benefits" within the meaning of Section 204(g) of ERISA, 29 U.S.C. § 1054(g), and are hence "rights" protected from elimination by plan amendment under the statute. *Ahng v. Allsteel, Inc.*, __F.3d __, 1996 U.S. App. Lexis 24970 (7th Cir. 1996).[2]

Significantly, the *Heath* case also dealt with an employee who was fired shortly before he was to become eligible for early retirement, which would have entitled him to additional pension benefits. In contrast, the Petitioners' members were clearly not legally entitled to the same level of health benefits with ITS that they enjoyed with SFTSI under the terms of any ERISA plan.

This Court's recent opinion in *Varity Corp. v. Howe*, 516 U.S. __, 134 L. Ed. 2d 130, 116 S. Ct. 1065 (1996) is also readily distinguishable and does not support Petitioners' position. There, the Court merely held that employees could sue their

2. In reaching its decision, the *Ahng* court acknowledged that other circuit courts also accord early retirement benefits protected status, including the Ninth Circuit. *Id.* at 24970, citing *Richardson v. Pension Plan of Bethlehem Steel*, 67 F.3d 1460, 1467-8 (9th Cir. 1995).

employer, as a plan administrator of various employee welfare benefit plans, for breach of its fiduciary responsibilities under ERISA when a loss of various welfare benefits was the result of a deliberate deception by the administrator regarding the availability of future benefits under the plan. More specifically, the Court determined that an action could be maintained under Section 502(a)(3) of the statute for breach of fiduciary obligations by the plan administrator in violation of Section 404 of ERISA.[3] The Court did not address whether such a claim could be maintained against non-administrators such as Respondents, nor did it generally hold that "employees may sue under ERISA for their right to receive health and welfare benefits" as Petitioners assert.

As Petitioners expressly concede, the issue of whether a Section 510 claim under ERISA can be brought for loss of welfare benefits was also not addressed by the *Varity* decision. (*See* Pet., p. 12). The *Varity* Court also did not even begin to decide whether a claim for interference with non-vested benefits could be asserted against a non-employer such as Santa Fe Railway in this instance, or whether such a claim could be made in the context of a mere alleged decline in employer contributions to a multi-employer benefit plan as opposed to the elimination of such benefits by a single employer as occurred in the *Varity* case. *Varity* is therefore completely inapposite to the case at bench.

3. Section 502(a)(3) of ERISA provides that a civil action may be brought by a participant or beneficiary to enjoin any act or practice which violates "any provision of this title or the terms of the plan," or to . . . "enforce any provisions of this title or the terms of the plan." Section 404(a) requires plan fiduciaries to administer the plan "solely in the interests of the participants and beneficiaries." Obviously, neither of these sections of the statute are in any way applicable to this action, in which no claim relating to the exercise of fiduciary duties or plan administration is at issue.

The foregoing factual dissimilarities between this case and those relied on by Petitioners readily demonstrate that there is no "real and embarrassing conflict of opinion and authority between courts of appeals" sufficient to justify the granting of certiorari. *NLRB v. Pittsburgh Steamship Co.* 340 U.S. 490, 502, 95 L. Ed. 479 (1951). This case is therefore not the appropriate vehicle to resolve any conflict which may exist between the circuit courts over whether a Section 510 claim can be stated for interference with non-vested welfare benefits under ERISA, and certiorari on this issue should be denied.

II.

THE COURT CORRECTLY CONCLUDED THAT THE 1974 RAILROAD RETIREMENT ACT IS A "GOVERNMENTAL PLAN" EXEMPT FROM ERISA.

Petitioners next assert that they may state a claim for violation of Section 510 based on Respondents' alleged "interference" with their railroad retirement benefits earned under the Railroad Retirement Act (RRA) of 1974. Petitioners base this argument entirely on the fact that ERISA does not expressly mention plans established pursuant to the 1974 RRA in its definition of "governmental plans" which are excluded from the statute's protection, even though it does mention that statute's predecessor, the RRA of 1937, which no longer exists. The per curiam panel properly rejected this argument, finding that the 1974 RRA was not included in ERISA's definitional provision when ERISA was enacted in 1974 because it was "not yet law" at that time. *See ibid.*, 80 F.3d at 352.

ERISA specifically exempts governmental plans such as those established under the Railroad Retirement Act from its operative effect. 29 U.S.C. § 1003(b)(1). "Governmental plans" are defined as plans established or maintained "for its

employees by the Government of the United States, by the government of any state or political subdivision, or by any agency or instrumentality of any of the foregoing," and specifically include "any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under the Act." 29 U.S.C. § 1002(32). The Railroad Retirement Act (RRA) of 1974, 45 U.S.C. § 231, *et seq.*, clearly falls within this statutory definition of a governmental plan, as it is administered by the Railroad Retirement Board (an independent agency of the executive branch of the United States Government) and is maintained by the United States Treasury. *See* 45 U.S.C. §§ 231f(a),(b), and 231n(a).

In the only other reported decision on this issue, a district court unequivocally held that the Railroad Retirement Fund is exempt from ERISA's effect because it constitutes a "governmental plan" within the meaning of the statute. In *Cornelio v. Consolidated Rail Corp.*, 585 F. Supp. 490, 493-4 (D. Conn. 1984), the district court thus stated that:

> Clearly the RRAs [Railroad Retirement Acts] provide much of the protection that ERISA provided for private retirement plans and that the 1974 RRA was adopted six weeks after the enactment of ERISA without amending the reference in ERISA so as to exempt the 1974 RRA appears to be an oversight. The 1935 and 1937 Acts do not now exist as pure and separate legislative acts. *They were absorbed into the 1974 enactment and now constitute one statute.* Thus, ERISA's exemptions, if taken literally, *would exempt plans under statutes no longer existent but not plans under the only RRA now in the U.S. Code as such.*

Id. at 493 (emphasis provided). Concluding that the failure of Congress to amend ERISA to specifically include the 1974 Act thereafter was a "weak reed upon which to lean" and a "poor beacon to follow" in construing the statute, the *Cornelio* court thus determined that "no action involving a pension plan under the 1974 RRA can be brought under ERISA." *Id.* at 494.

Significantly, the *Cornelio* decision was based on a fully-informed analysis of the legislative history of ERISA and of Congress' intent to exclude governmental plans such as the 1974 RRA from its operative effect. Indeed, in reaching its conclusion, the *Cornelio* court cited legislative history specifically stating that the coverage requirements of the statute "do not apply to governmental plans (including Railroad Retirement Act plans)," without limiting *which* RRA plans were so exempted. *Id.* at 494, citing 1974 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.) 5043.

Borrowing from Judge Dorsey's reasoning in the *Cornelio* case, the per curiam panel correctly decided that the exclusion of the RRA of 1974 from ERISA's coverage "is not precluded by the inadvertent failure to specifically identify the 1974 statute" in Section 1003 of ERISA. *Ibid.*, at 80 F.3d 348, at 353. This conclusion is inescapable because there is only one Railroad Retirement Act ("RRA"), the one amended in 1974 that is found at 45 U.S.C. § 231, *et seq.*, which superseded the 1935 and 1937 acts.[4] To conclude as Petitioners do that statutes

4. It is common to refer to acts by the year in which they were enacted. ERISA has been amended many times since it was enacted in 1974, yet it is still commonly referred to as the "Employee Retirement Income Security Act of 1974." *See, e.g., Mertens v. Hewitt Associates*, 508 U.S. 248, 124 L. Ed. 2d 61, 113 S. Ct. 2063, 2065 (1993). Likewise, the Securities Exchange Act of 1934 is still commonly referred to by that term even though it too has been amended many times. *See Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1566 (9th Cir. 1993).

no longer existing are excluded from ERISA's coverage as "governmental plans," while the only RRA in existence is not, would thus be to "attribute to Congress a legislative non-sequitur without rational explanation," and hence improper. *Cornelio, supra*, 585 F. Supp. at 493.

Furthermore, and contrary to Petitioners' assertions, the 1974 amendments to the RRA gave no inkling of any intent to remove RRA plans from the government plan exception in ERISA. The amendments of 1974 did not alter the structure or administration of the RRA, which is subject to its own set of specific statutory regulations and strict administrative safeguards. *U.S. Retirement Board v. Fritz*, 449 U.S. 166, 177-78, 66 L. Ed. 2d 367, 101 S. Ct. 453, 459 (1980); 45 U.S.C. § 231n.[5] In addition, since it is administered by the government, the Railroad Retirement Plan was not viewed as vulnerable to many of the problems associated with private pension plans, thereby causing Congress to exempt the RRA from ERISA's coverage. As the per curiam panel noted:

> It is reasonable to assume plans under the 1935 and 1937 Railroad Retirement Acts were excluded from ERISA because such plans were already subject to independent federally administered statutory controls and were not plagued by the problems affecting private pension plans. This is equally true of plans adopted under the 1974 Railroad Retirement Act.

Ibid., 80 F.3d at 351.

5. The purpose of the "restructuring" of the RRA in 1974 was to create a two-tier system of benefits to account for the inequities caused by dual eligibility under the RRA and the Social Security Act. *Fritz, supra*, 449 U.S. 166 at 177-78.

Petitioners further contend that Section 510 was intended to apply to claims for interference with Railroad Retirement benefits because Congress desired to specifically provide such protections to railroad workers. There is not one whit of legislative history or judicial authority to support this contention, however, and in fact the above-referenced legislative history manifestly requires a directly opposite conclusion. As the Ninth Circuit panel also properly noted, Congress "added to the financial stability of the Railroad Retirement Act plans and strengthened government controls over such plans" by enacting the 1974 RRA, thereby diminishing the need for the kind of added protections Petitioners contend that Congress somehow intended in enacting Section 510. (*Ibid.*, 80 F.3d at 352 (Petition, Appendix I, Opinion, p. 10a), citing *Fritz, supra*, 449 U.S. at 169 (1980) and 1974 U.S.C.C.A.N. 5702-14. Petitioners' "congressional intent" argument is therefore wholly specious.[6]

The Ninth Circuit therefore properly held that the 1974 RRA is exempt from ERISA's coverage as a "governmental plan," and that Petitioners may not proceed on their Section 510 claim alleging an intent to interfere with their railroad retirement benefits. Petitioners have presented no compelling reasons for review by this Court of that perfectly sensible statutory interpretation, thereby requiring that certiorari be denied in this issue as well.

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6. Petitioners' reliance on the dissenting opinion in *Varity Corp. v. Howe, supra*, in support of their argument that the "plain language" of ERISA controls in this instance is also most puzzling, given the fact that Justice Thomas was only one of three dissenting justices in that case and expressly characterized the Court's opinion in that matter as "quite limited." *Ibid.*, 116 S. Ct. at 1090.

III.

THE COURT OF APPEALS' DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S *HUNT* AND *BROWN GROUP* DECISIONS.

Finally, the petition seeks review of the Court of Appeals' holding that Petitioner IMREA lacked standing to bring this suit on its members' behalf, because "[t]o establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit." (Pet., Appendix I, Opinion, p. 6a). As precedent for such holding, the Ninth Circuit cited its earlier decision, *United Union of Roofers, etc. v. Insurance Corp. Of America*, 919 F.2d 1398, 1400 (9th Cir. 1990), which held that a labor union lacked "associational standing" to bring a suit on behalf of certain of its members to recover unpaid wages under a payment bond because such claims necessarily involved individualized proof and thus individual participation of the union members. The *Roofers* court properly concluded that the suit did not meet the third prong of this Court's three-prong test for "associational standing" set out in *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), which requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

IMREA does not dispute the fact that the participation of its members in this lawsuit would be required to assess their individual damage claims, as the Ninth Circuit found. But IMREA contends that the court's "*sua sponte*" denial of standing on that ground conflicts with the decision rendered some two months later by this Court in *UFCW v. Brown Group*, 517 U.S. __, 134 L. Ed. 2d 758, 116 S. Ct. 1529 (1996), which

supposedly "revised the law of associational standing." (Pet., p. 14). There is no merit to this contention.

To begin with, it is immaterial that IMREA's lack of standing was raised by the Court of Appeals *sua sponte*. It is well settled that the issue of whether a plaintiff has proper standing may be raised on the court's own motion at any time, including on appeal. *See, e.g., National Org. For Women v. Scheidler,* 510 U.S. __, 127 L. Ed. 2d 99, 107, 114 S. Ct. 798 (1994) ["Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation"]; *FW/PBS Inc. v. City of Dallas,* 493 U.S. 215, 229-232, 107 L. Ed. 2d 603, 110 S. Ct. 596 ["The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines"].

Moreover, the Ninth Circuit's determination that IMREA lacks standing is not in conflict with this Court's *Brown Group* decision. In its attempt to argue otherwise, the petition completely misinterprets and misstates the actual holding and rationale of that case. There, the associational standing issue arose in the context of a suit brought by a labor union under the WARN Act (Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.*), which expressly permits unions to sue employers for sixty days' back pay for affected members under certain specified conditions. This Court held that with respect to such claims, Congress abrogated the otherwise applicable third prong of the associational standing test under *Hunt* and was not precluded from doing so by Article III of the Constitution. The Opinion of the Court concluded that although the first two prongs of the test are grounded on the requirements of Article III, the third prong is not. Rather, it is a "judicially fashioned and prudentially imposed" limitation on

the exercise of federal jurisdiction which was "malleable by Congress." *Ibid.*, 134 L. Ed. 2d at 763, 766-771.

Unlike the WARN Act, neither ERISA nor FELA expressly authorize suits by labor unions or other associations of employees to seek money damages for individual members.[7] Accordingly, *Brown Group* clearly has no application to the instant case. Contrary to IMREA's claim, that decision did not in any way modify the general application of the third prong of the *Hunt* test in cases where Congress has not abrogated that limitation as it did in enacting the WARN Act. Clearly, the Court did not create a "new approach" to the third prong which will now require a case-by-case factual analysis by the district court, as IMREA apparently suggests. (Pet., pp. 16-17).

Hence, the fact that the complaint alleges that IMREA represents its members "pursuant to irrevocable assignments and powers of attorney" does not overcome the defect in IMREA's standing. (Pet., pp. 3, 14). Despite the conclusory characterization of the purported assignments as "irrevocable," the petition states that IMREA "will not keep any portion of the recovery it obtains for its members." (Pet., p. 17). Accordingly, unlike the health care provider in *Misic v. Building Service Emp. Health Plan,* 789 F.2d 1374 (9th Cir. 1986), cited in the petition, IMREA admits that it is not suing for its own benefit on claims which it actually owns, to recover money it would be entitled to keep by virtue of the so-called assignments. Rather, the assignments were merely a formalistic device, lacking any

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7. In this regard, ERISA allows for civil actions to be brought only by participants, beneficiaries, the Secretary of Labor, or a fiduciary, and does not permit suit by a plaintiff association. 29 U.S.C. § 1132 (a). The categories of potential plaintiffs set forth in the statute are exclusive. *Pressroom Unions etc. v. Con. Assurance Co.,* 700 F.2d 889, 893 (2d Cir. 1983). Likewise, the FELA limits suits to injured railroad workers. 45 U.S.C. § 51.

real substance, employed by IMREA in an attempt to circumvent the standing barrier erected by *Hunt's* third prong.

Additionally, the validity of the purported assignments would be based on state law, under which causes for personal injuries (such as the subject FELA claims) are non-assignable. *See Board of Trade of S.F. v. Swiss Credit Bank*, 728 F.2d 1241, 1242-3 (9th Cir. 1984); *Murphy v. Allstate Insurance Co.*, 17 Cal. 3d. 937, 942 (1976). Petitioners' Section 510 ERISA claim is also non-assignable, as it is akin to one for tortious wrongful discharge under state law.[8]

Finally, certiorari is not necessary to consider IMREA's contention that denial of its associational standing interferes with the First Amendment rights of its members. (Pet., pp. 14, 17-19). This constitutional argument was not raised below, and should not be considered by this Court for that reason. *Ellis v. Dixon*, 349 U.S. 458, 460, 99 L. Ed. 1231, 75 S. Ct. 850 (1955). Petitioners' argument is also unsupported by any applicable authority because it is patently meritless. This contention, if sustained, would require the virtual elimination of the third prong of the *Hunt* test — something even IMREA does not appear to advocate. That limitation on associational standing is necessary to preserve the orderly administration of justice and to protect IMREA's own members, for all of the reasons stated in *Brown Group* as to why *Hunt's* third prong was judicially created and retains its "value" even though the Court concluded it does not rest on Article III. *Ibid.*, 134 L. Ed. 2d at 769. Accordingly, the requirement that IMREA's members must themselves bring suit to recover their own money damages does

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8. The Ninth Circuit has held that a Section 510 claim is similar to a state law claim for wrongful discharge, which under California law sounds in tort. *Felton v. Unisource Corp.*, 940 F.2d 503, 512 (1991); *Gantt v. Sentry Insurance*, 1 Cal. 4th 1083, 1085-86 (1992).

not represent an unreasonable interference with their First Amendment rights.

CONCLUSION

For all of the foregoing reasons, the petition should be denied in all respects.

Respectfully submitted,

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